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August 28, 2000

Title VI Guidance Comments
US Environmental Protection Agency
Office of Civil Rights (1201A)
1200 Pennsylvania Avenue NW
Washington, DC 20460

Re: Draft Title VI Guidance for EPA Assistance Recipients Administering
Environmental Permitting Programs and Draft Revised Guidance for Investigating
Title VI Administrative Complaints Challenging Permits

Dear EPA Office of Civil Rights:

Thank you for the opportunity to submit comments on the above referenced draft guidance documents. We were disappointed to receive the Federal Register Notice in mid-August, barely providing enough time to make comments. Please double check that we are on the appropriate mailing list to receive notices on items available for public comment by EPA's Office of Civil Rights in a timely fashion. Despite the limited time frame, we have the following comments on the Guidance Documents:

**I. Comments on Draft Guidance for EPA Assistance Recipients Administering
Environmental Permitting Programs**

1. Enforcement Threat Must Exist

Throughout the Guidance Documents, EPA states several times that "EPA encourages the use of informal resolution to address Title VI complaints whenever possible." 65 Fed. Reg. 124 at 36955, 39669 (and other locations) June 27, 2000 (hereafter "Draft Guidance"). While we agree that informal resolution may in certain circumstances be the preferred method for resolving a Title VI problem, more often, we believe that Title VI violations will only be truly resolved with the threat of EPA enforcement action. The Guidance Documents list several principles, including that "Strong civil rights enforcement is essential." Id. at 39669. The fact of the matter is that if voluntary compliance agreements and informal resolution were an adequate and effective means for enforcing Title VI, Title VI would have no place in American law because companies, agencies, and other entities would conduct themselves in a manner that did not discriminate on the basis of race, color, or national origin. Unfortunately,

such discrimination occurs regularly throughout the United States, particularly in the siting of facilities and issuance of permits.

We believe that the strength and effectiveness of Title VI can be judged in great part by the willingness of EPA and other government entities to enforce the act. Without adequate, regular, and strong enforcement of Title VI, there will never be environmental equality. We suggest that in the Guidance Documents, EPA specifically address different types of enforcement mechanisms EPA may employ to ensure compliance with Title VI. Furthermore, that EPA focus on promising to enforce Title VI as opposed to reassuring recipients of federal funds that informal resolution is the preferred method for solving a dispute.

Finally, we find it inapposite that EPA is charged with enforcing Title VI, yet specifically excludes itself from abiding by Title VI. Draft Guidance at 39669. While the Draft Guidance does state that EPA "is committed to a policy of nondiscrimination in its own permitting programs," we are concerned that such a commitment is not legally enforceable and EPA may, in its discretion, choose not to be so committed in certain circumstances. EPA clearly has authority to govern itself according to the ideals and goals enumerated in Title VI. EPA's self-exclusion from this important federal law weakens the power of Title VI to promote and sustain environmental equality. We urge EPA to make a legal commitment to the principles and guidelines of Title VI, and follow them in administering all the environmental laws and programs that EPA is charged with administering.

2. Adverse Impact Analysis Tools

The Draft Guidance discusses various tools for evaluating adverse impact. Draft Guidance at 39660. While the tools described are important to conducting a proper adverse impact analysis, the fact that such an analysis is not *required* greatly defeats the purpose of Title VI and reduces the chances of achieving environmental equality as soon as possible. EPA should examine the possibility of instituting a required adverse impact analysis so that every permit issued would contain such an analysis. While such a system may delay the issuance of a new permit, it would ensure that permits are not issued in a discriminatory manner.

II. Comments on Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits

Substantial and Legitimate Justification

We believe that EPA excluded important information from its discussion on the substantial, legitimate justification in the Draft Guidance. Draft Guidance at 39683. The Draft Guidance does not make it absolutely clear that the substantial and legitimate justification must be non-discriminatory.¹ We suggest EPA include further guidance on the

¹ See e.g. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (under Title VII, any exception to the statute in the form of a legitimate business reasons or interests must be non-discriminatory).

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substantial and legitimate justification to avoid needless litigation over a proposed discriminatory "substantial and legitimate justification."

The Draft Guidance also fails to recognize that to the extent state actions are implicated in a Title VI complaint, the legal standards established by EPA for review of the state's action may be inapplicable because the U.S. Constitution establishes a more involved and protective standard to review adverse impact resulting from classifications of people on the basis of race, color, and national origin. For example, this heightened standard would be applicable to a state-run NPDES permit program where the issuance of a permit may be a "state action" that triggers Constitutional standards above and beyond those set by EPA. EPA's clarification of this issue is likely to ensure that everyone understands Title VI and its standards and limitations.

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If you have any questions regarding these comments, please feel free to contact me at 520-529-1798. Thank you.

Sincerely,

Vera S. Kornylak